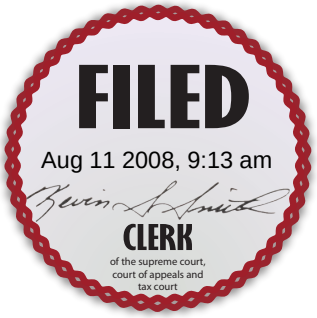

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IN THE COURT OF APPEALS OF INDIANA

SUE HAYES,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 32A01-0712-CV-584
	)	
SEAN SMITH and BETH SMITH,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Mark A. Smith, Judge
Cause No. 32D04-0706-CC-137

August 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

In this action for breach of contract arising from the sale of residential real estate, Sue Hayes appeals the trial court's entry of summary judgment in favor of Sean and Beth Smith (the "Smiths") and its denial of her summary judgment motion. Hayes raises the following restated issue: whether the trial court erred in failing to find that the real estate purchase agreement's default clause was a penalty and in finding that Hayes was precluded from pursuing legal remedies because she did not return the earnest money. The Smiths cross-appeal and raise the following restated issues: whether they should be awarded reasonable attorney fees and costs.

We affirm and remand.

FACTS AND PROCEDURAL HISTORY

On January 8, 2007, the Smiths, using a form purchase agreement (the "contract"), offered to purchase Hayes's Hendricks County home. On January 17, 2007, Hayes accepted the Smiths' offer. Pursuant to the contract, the Smiths waived all contingencies to close the transaction except for the home's inspection and agreed that the closing would be completed on or before February 9, 2007. The Smiths were required under the contract to pay $3,000.00 in earnest money. The contract also contained a default provision that stated: "[i]f Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law." *Appellant's App.* at 11.

Because it appeared the Smiths were not going to be able to close by February 9, 2007, the parties executed an "Addendum to Purchase Agreement" (the "Addendum"), extending the closing to on or before March 9, 2007. Pursuant to the Addendum, the

Smiths agreed to pay Hayes $35.00 a day for every day beyond February 9, 2007 until the date of closing. *Id*. at 15. The Smiths were not able to obtain a loan because the lender's appraisal determined that the real estate was of insufficient value to secure the loan needed for the purchase price. After failing in an attempt to renegotiate the purchase price with Hayes, the Smiths were unable to close on the real estate. On March 23, 2007, the Smiths sent Hayes a letter notifying her that they were terminating the contract and forfeiting the earnest money.

Hayes was later able to sell the house to a third-party buyer. She retained the earnest money and, on June 20, 2007, filed a complaint against the Smiths, alleging breach of contract. As a result of such breach, Hayes claimed to suffer a total of $27,127.64 in damages including: per diem damages under the Addendum of $3,395.00; a broker's commission of $17,970.00,; mortgage payments for four months totaling $3,824.72; homeowners' warranty of $435.00; prorated property tax of $622.38; utilities totaling $164.54; and miscellaneous maintenance expenses totaling $716.00.

Both Hayes and the Smiths filed motions for summary judgment. The Smiths also filed a motion to strike a supplemental affidavit submitted by Hayes. After holding a hearing on the parties' motions for summary judgment and the Smiths' motion to strike, the trial court issued an order denying the motion to strike, denying Hayes's motion for summary judgment, and granting summary judgment in favor of the Smiths. Hayes now appeals, and the Smiths cross-appeal.

DISCUSSION AND DECISION

I. Hayes's Appeal

When reviewing a grant or denial of summary judgment, we apply the same standard as the trial court: summary judgment is only appropriate when the designated evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Jacobs v. Hilliard*, 829 N.E.2d 629, 632 (Ind. Ct. App. 2005), *trans. denied*. On appeal, we consider all of the designated evidence in the light most favorable to the nonmoving party. *Walton v. First Am. Title Ins. Co.*, 844 N.E.2d 143, 146 (Ind. Ct. App. 2006), *trans. denied*. The trial court's order granting a motion for summary judgment is cloaked with a presumption of validity, and a party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. *Am. Home Assurance Co. v. Allen*, 814 N.E.2d 662, 666 (Ind. Ct. App. 2004), *trans. dismissed* (2005). The entry of specific findings and conclusions offer insight into the reasons for the trial court's decision and facilitate appellate review, but are not binding on this court. *Troxel Equip. Co. v. Limberlost Bancshares*, 833 N.E.2d 36, 40 (Ind. Ct. App. 2005), *trans. denied*.

Hayes argues that the trial court erred when it granted summary judgment in favor of the Smiths and denied her motion for summary judgment. She specifically contends that her retention of the earnest money paid by the Smiths did not preclude her from filing her complaint and seeking additional damages for breach of the contract because the default provision contained in the contract was a penalty and not a liquidated damages

clause. Hayes further claims that because the default provision was a penalty, the trial court erred when it concluded as a matter of law that she was precluded from seeking her elected remedy of pursuing actual damages by filing a complaint.

If the terms of a contract are clear and unambiguous, courts will not construe them and must enforce them as agreed upon by the parties. *Evan v. Poe & Assocs., Inc.*, 873 N.E.2d 92, 98 (Ind. Ct. App. 2007). When construing a contract, we must determine the intent of the parties by the language employed in the document. *Id.* The question of whether a contract provision stipulating damages in the event of a breach is considered a valid liquidated damages clause or a penalty, which is unenforceable, is purely a question of law. *Olcott Int'l & Co., Inc. v. Micro Data Base Systems, Inc.*, 793 N.E.2d 1063, 1077 (Ind. Ct. App. 2003), *trans. denied*.

"The term 'liquidated damages' applies to a specific sum of money that has been expressly stipulated by the parties to a contract as the amount of damages to be recovered by one party for a breach of the agreement by the other, whether it exceeds or falls short of actual damages." *Time Warner Entm't Co., L.P. v. Whiteman*, 802 N.E.2d 886, 893 (Ind. 2004). In determining whether a stipulated sum payable upon the breach of a contract constitutes liquidated damages or a penalty, the facts, the intention of the parties, and the reasonableness of the stipulated sum under the circumstances of the case are all to be considered. *Olcott*, 793 N.E.2d at 1077. If the sum sought in the contract provision is grossly disproportionate to the loss that may result from the breach of contract, the sum should be treated as a penalty and not a liquidated damages clause. *Id*.

Here, the default provision in the contract stated: "[i]f Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law." *Appellant's App.* at 11. Thus, the language used characterized the retention of the earnest money as "liquidated damages." "The description of a deposit as 'liquidated damages' in the event of a breach has been held to indicate the parties' intention to limit their recovery to only the amount of the stated liquidated damages." *Beck v. Mason*, 580 N.E.2d 290, 293 (Ind. Ct. App. 1991). In *Beck*, the buyers signed a contract to purchase the sellers' home and paid a $1,000.00 deposit on the property. *Id*. at 291. The contract contained a provision, which stated: "Should Purchaser fail to complete said sale for any reason other than defective title, or because Purchaser's loan is refused, the deposit shall be retained as liquidated damages and not as a penalty or a forfeiture." *Id.* When the buyers failed to complete the sale, the sellers kept the deposit and claimed that the receipt of the $1,000.00 deposit did not limit them from collecting the balance of their damages. *Id*. at 292-93. This court held that, although a liquidated damages clause does not *per se* restrict a party from recovering additional damages, the parties in *Beck* expressly designated the deposit as liquidated damages rather than a penalty, and this suggested that the intent of the parties had been to limit their remedy to the recovery of liquidated damages. *Id*. at 293.

In the present case, the contract was clear and unambiguous. Upon default by the buyer, the seller had the option of retaining the earnest money deposit or returning it and suing the buyer. Like in *Beck*, the default provision in the contract did not per se restrict

Hayes from recovering additional damages upon a breach by the Smiths. Instead, the provision indicated the parties' intent to allow Hayes the option to either retain the earnest money as liquidated damages or return the money and sue the Smiths to recover additional damages. We conclude that the default provision in the contract was a liquidated damages clause and not a penalty. Therefore, by retaining the $3,000.00 earnest money deposit when the Smiths breached the contract, Hayes elected her remedy and could not also bring a claim against the Smiths for damages. By the clear and unambiguous language of the contract, Hayes's elected remedy foreclosed her option to sue the Smiths without returning the earnest money deposit. The trial court did not err when it granted summary judgment in favor of the Smiths and denied summary judgment in favor of Hayes.

II. The Smiths' Cross-Appeal[1]

The Smiths argue that they should be awarded their reasonable attorney fees and costs in litigating this matter. The contract contained the following provision: "In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees." *Appellant's App.* at 12. The Smiths contend that based upon that provision, this court should remand to the trial court for a determination of reasonable attorney fees and costs. Hayes argues that the Smiths have waived this argument because they did not raise the issue before the trial court or in response to her motion for summary judgment.

[1] The Smiths also raise two other issues on cross-appeal, which we do not address because of our conclusion that the trial court did not err in granting summary judgment in favor of the Smiths.

"Failure to raise an issue before the trial court will result in waiver of that issue." *Van Winkle v. Nash*, 761 N.E.2d 856, 859 (Ind. Ct. App. 2002). "'[T]he crucial factor . . . in determining whether the [appellant] may inject what appears to be a new issue into the appeal is whether [the appellee] has unequivocal notice of the existence of the issue and therefore, had an opportunity to defend against it.'" *Id*. at 860 (quoting *United Farm Bureau Mut. Ins. Co. v. Lowe*, 583 N.E.2d 164, 168 (Ind. Ct. App. 1991), *trans. denied* (1992)).

Here, although it does not appear that the Smiths requested attorney fees and costs in their motion for summary judgment, we cannot say that this is an unexpected request or a new issue that Hayes had no notice of or opportunity to defend against. The contract signed by both parties contained a provision stating that in the event of litigation, the prevailing party *shall* be entitled to reasonable attorney fees and costs. Further, in their answer to Hayes's complaint, the Smiths included a request for attorney fees and costs in defending the action. *Appellant's App*. at 21. We therefore conclude that the Smiths have not waived their request for attorney fees and that Hayes had ample notice that the Smiths, as the prevailing party in the litigation, would be entitled to reasonable attorney fees and costs. We remand to the trial court for a determination of reasonable attorney fees and costs.

Affirmed and remanded.

FRIEDLANDER, J., and BAILEY, J., concur.